



**COMMONWEALTH of VIRGINIA**  
*Office of the Attorney General*

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**MEMORANDUM**

**TO: BRIAN MCCORMICK**  
Regulatory and Manual Section Manager  
Department of Medical Assistance Services

**FROM: REATHA B. KAY**  
Assistant Attorney General

**DATE: June 16, 2005**

**SUBJECT: Emergency Regulations concerning Day Support Waiver for Individuals with Mental Retardation**

I have reviewed the attached emergency regulations concerning the establishment of the Day Support Waiver for Individuals with Mental Retardation (“Day Support Waiver”). The Department is relying on language in Item 326(LL) of the 2005 Appropriation Act (2005 *Virginia Acts of Assembly*, Chapter 951) with regard to these changes.

Item 326LLL provides, in part, that “[c]ontingent upon approval by the Centers for Medicare and Medicaid Services (CMS), the Department of Medical Assistance Services (DMAS) is directed to develop such waiver in coordination with the Department of Mental Health, Mental Retardation, and Substance Abuse Services, and affected constituents. The Department shall have the authority to enact emergency regulations under § 2.2-4011 of the Administrative Process Act to effect this provision.”

It is our understanding that the Department has submitted a home and community-based care waiver application (“1915(c) waiver application”) to the Centers for Medicare and Medicaid Services (“CMS”) for approval, and that this 1915(c) waiver application provides for the establishment of the Day Support Waiver, to provide day support and prevocational services to

mentally retarded individuals who meet the ICF/MR level of care criteria. Further, it is our understanding that the 1915(c) waiver application has yet to be approved by CMS.

Based on that review, it is this Office's view that the Director, acting on behalf of the Board pursuant to Va. Code §§ 32.1-324, does not have the authority to promulgate emergency regulations with respect to establishment of the Day Support Waiver. However, once CMS has approved the 1915(c) waiver application, it is this Office's view that the Director will have the authority to promulgate emergency regulations with respect to the Day Support Waiver subject to compliance with the approved 1915(c) waiver application and the provisions of Article 2 of the Administrative Process Act.

Accordingly, subject to CMS' approval of the 1915(c) waiver application, and with the prior approval of the Governor, these regulations will qualify for the "emergency" exemption from Article 2 requirements. Please be advised, however, that under Va. Code § 2.2-4011(A), the Department must state in writing the nature of and necessity for such emergency action, and this appears to have been accomplished in the "Agency Background Document." In addition, the regulations shall be effective for no more than twelve months from the emergency regulatory action on this subject matter. As the Department intends to continue regulating the subject matter governed by this emergency regulation beyond 12 months, it will be necessary to replace these emergency regulations with regulations duly promulgated under Article 2 of the APA. A Notice of Intended Regulatory Action relating to the proposed replacement regulations must be filed with the Registrar within 60 days of the effective date of the emergency regulations. The proposed replacement regulations must be filed with the Registrar within 180 days after the effective date of the emergency regulations.

If you have any questions or need any additional information, please feel free to call me at 786-1841.

cc: Kim F. Piner, Esquire

Attachment